Supreme Court, U.S.
FILED

09-802 AUG 27 2009

OFFICE OF THE CLERK

No. 09-

In the

SUPREME COURT OF THE UNITED STATES

Martin Nitschke

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for
the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Martin Nitschke, *pro-se*
2323 Campbell Road
Houston, Texas 77080

Telephony: 713-467-6718

This Page has been intentionally left blank.

QUESTIONS PRESENTED

1. May the United States Tax Court knowingly, intentionally, and willingly refuse to issue findings of fact when issuing a denial of a Motion to Vacate said Court's decision?

2. Is the United States Tax Court statutorily required to abide by the Federal Rules of Civil Procedure as it regards its ministerial duties to issue findings a fact when denying a Motion to Vacate?

3. May the United States Tax Court tolerate the known failure of the Respondent-Appellant Commissioner of Internal Revenue failure to maintain its system of records in compliance to the laws of the United States by failing to issue findings of fact?

4. May an Appellate Court stipulate that the lower Court is not required to issue a findings of fact when said lower Court denies a Motion to Vacate, wherein said failure to issue a findings of fact stands in contradiction to Federal Rules of Civil Procedure Rule 52(a)?

5. How may the Appellate Court refuse to acknowledge the necessity of the Lower Court to move in compliance to Federal Rule of Civil Procedure 52(a), which requires the trial judge

to make findings of fact and conclusions of law in all civil actions tried upon the facts without a jury or with an advisory jury?

6. How may the Appellate Court rule on the Lower Court's denial of a Motion to Vacate when said lower court failed to provide a clear understanding to the basis of the trial court's decision respecting the instant Motion to Vacate, when the aforementioned lower Court has failed to issue clear and precise findings of fact to substantiate its denial in compliance to Federal Rules of Civil Procedure Rule 52(a)?

7. The Third Circuit Court of Appeals stated in Vilas Urtekar v. Commissioner, 2008 TNT 243-4, No. 08-1317 (3rd Cir. 12/15/2008) that the United States Tax Court abused its direction for failing explain why it denied his Motion to Vacate when it simply rubber stamped "Denied" upon the motion.

PARTIES TO THE PROCEEDING

The caption contains the names of all the Parties in the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....ii

THE PARTIES iv

TABLE OF CONTENTS v

TABLE OF APPENDICES.....vi

PETITION FOR WRIT OF CERTIORARI.....1

JURISDICTION 2

STATUTORY PROVISION UNDER REVIEW.....3

STATEMENT FOR SECURING WRIT.....4

CONCLUSION.....6

TABLE OF APPENDICES

Transaction Codes Pocket Guide, Document 11734 (Rev. 6-2004) (in part) 1a

Order of the United States Tax Court stamped "denied" 3a

Order and Opinion 5th Circuit United States Court of Appeals **(08-60974)** 13a

Title 5 USCA Part 1 Chapter 5 Subchapter II: Administrative Procedures Act

Title 44 USCA Chapter 31 Records Management by Federal Agencies

Federal Rules of Civil Procedure Rule 52(a) Policy Manuals of the Internal Revenue Service: Internal Revenue Manual, and 6209 ADP Manual

PETITION FOR WRIT OF CERTIORARI

TO: The United States Supreme Court

The above-named Petitioner hereby petitions the United States Supreme Court for a Writ of Certiorari to review a decision of the 5th Circuit Court of Appeals issued on the date noted above, upon the grounds that the United States Tax Court failed to substantiate its Denial of the Order to Vacate in compliance to Federal Rules of Civil Procedure Rule 52(a), and that the Appellate Court refused to substantiate that said lower court shall comply with the aforementioned Rule of Civil Procedure.

DATED: August 27th, 2009

JURISDICTION

1. The 5th Court of Appeals issued its final order in this Case on May 29th, 2009.

2. This Writ is presented to the Court in compliance to Title 28 USCA Part IV Chapter 81 § 1254.

3. Copy of this Petition has been submitted to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

4. Copy of this Petition has been submitted to lead Counsel Ms. Patricia McDonald Bowman, Attorney, Department of Justice, Tax Division, Appellate Section, Post Office Box 502, Washington D.C., 20044; Telephone: 202 514 3361.

STATUTORY PROVISION UNDER REVIEW

1. The statutory provision moved by the Internal Revenue Service is codified in Title 26 USCA Subtitle F Chapter 78 § 7602.

2. The statutory provisions of an Agency' System of Records maintained in compliance to Title 5 USCA Chapter 5 § 552a upon an Individual.

3. The statutory provision of the United States Tax Court, and the 5th Circuit Court of Appeals to substantiate the provisions of Federal Rule of Civil Procedure Rule 52(a) when issuing dispositive orders.

CONCISE STATEMENT FOR SECURING WRIT

An administrative agency shall maintain its records in compliance to Records Management by Federal Agencies, and the Federal Administrative Procedures Act. In compliance to the Federal Administrative Procedures Act, an Administrative Agency's records shall stand accurate, relevant, timely, and complete.

In this instant case, the Internal Revenue Service's system of records contains a valid and invalid segment. This known segmentation of the Internal Revenue Service's system of records was information deliberately withheld from the United States Tax Court by the Respondent Commissioner of Internal Revenue. The known invalidity of administrative records is the only way the Respondent Commissioner of Internal Revenue may maintain that its specific record maintained upon an individual stands in compliance to Title 5 USCA Part I Chapter 5 Subchapter II.

In response to the Case Decision issued by the United States Tax Court, the Petitioner moved a Motion to Vacate in which he challenged the findings of fact issued by the United States Tax Court by supplying predicated evidence, which said Court said was needed to substantiate his argument.

The United States Tax Court has deliberately refused to issue a findings of fact in compliance to Federal Rules of Civil Procedure Rule 52(a), when it denied the Petitioner Appellant's Motion to Vacate,

which addressed the evidentiary elements challenged by said Court in its original decision. The failure of the United States Tax Court to issue a clear tier of findings of fact denies the Petitioner- Appellant the ability to properly challenge said "rubber stamped denial" in the Appellate Court.

When the Appellate Court fails to substantiate the statutory necessity of the United States Tax Court to abide by the substantive Rules of the Court, the Petitioner-Appellant is directly denied his substantive standing to secure the administrative due processes of judicial authority.

CONCLUSION

THEREFORE, Petitioner Martin Nitschke, prays that:

1. The Honorable United States Tax Court to Vacate its Order and Decision granting the Respondent's Motion for Summary Judgment;
2. That this Honorable United States Tax Court therefore determine the Notice of Determination is an invalid issuance, which subsequently denies the issuance by the Respondent Commissioner of Internal Revenue a Notice of Federal Tax Lien for the taxable calendar years listed[1] in this litigation,
3. And any further relief as the law requires.

Respectfully submitted,

/s/ Martin Nitschke, Pro Se

[1] Taxable calendar years 1993, 1997, 1998, 1999, 2000, 2001, and 2002

APPENDIX

Transaction Codes
Pocket Guide

IRS
Department of the Treasury
Internal Revenue Service
publish.no.irs.gov
Document 11734 (Rev. 6-2004)
Catalog Number 33169Q

Trans. Code	File	D/C	Title
463	B		Waiver to File on Mag Tape
464	B		Reversal of TC 463
470	I/B/A		Taxpayer Claim Pending
471	I/B/A		Reversal of Taxpayer Claim Pending
472	I/B/A		Reversal of Taxpayer Claim Pending
474	I/B/E		Interrupts Normal Delinquency Processings
475	I/B/E		Permits TDI Issuance
480	I/B/A		Offer-in-Compromise Pending
481	I/B/A		Offer-in-Compromise Rejected
482	I/B/A		Offer-in-Compromise

Trans. Code	File	D/C	Title
			Withhdrawn
483	I/B/A		Correction of Erroneous Posting of TC 480
488	B		Installment and/or Manual Billing
489	B		Installment Defaulted
490	P		Mag Media Waiver
494	B/I		Notice of Deficiency
495	B/I		Closure of TC 494 or correction of TC 494 processed in error
500	I		Military Deferment
502	I		Correction of TC 500 Processed in Error
503			TC 500 changed to 503 when posting TC 502
510	I		Releases Invalid SSN Freeze on Refunds
520	I/B/A		IRS Litigation Instituted
521	I/B/A		Reversal of TC 520
522	I/B/A		Correction of TC 520 Processed in Error
524			Collateral Agreement Pending
525			Collateral Agreement No Longer Pending
528	I/B/A		Terminate Stay of Collection Status

UNITED STATES TAX COURT

Martin Nitschke

Petitioner

Docket Number: 696-07 L

Motion to Vacate

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent

U.S. TAX COURT
DENIED
JUL - 8 2008
(Signed) Mary Ann Cohen

Petitioner Martin Nitschke hereby presents the foregoing Motion to Vacate the Order and Decision of the Court issued on May 29th, 2008

1. The Respondent Commissioner of Internal Revenue's statutory authority moves in compliance to language, chronology, and provision

of Federal law. The Respondent Commissioner of Internal Revenue is moving an in house administrative collection activity, which as a material fact of law, requires a legal application of statutory authority.

2. The Respondent Commissioner of Internal Revenue and its Counsel stood wrongful misleading silence in the United States Tax Court by failing to present that fact, which is maintained in the administrative record in order to perfect the plain error in statement of fact that its Notice of Determination stands in substantive contradistinction to Records Management by Federal Agencies[2].
3. The Respondent Commissioner of Internal Revenue is moving under a *conclusive presumption* in order to mask its known wrongful misleading silence, which it has used to issue its Notice of Determination wherein said Notice stands in direct violation of Title 26 USCA Subtitle F § 6330(c) (1) as the Respondent is not able to substantiate its administrative records stand in compliance to Records Management by Federal Agencies and the Federal Administrative Procedures Act[3].

---

[2] Title 44 USCA Chapter 31: The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

[3] Title 5 USCA Chapter 5 § 552a

4. The Settlement Officer failed to validate all applicable records stand in compliance to law, which is self evident, as there is no document location number preceded by the Transaction Code 494 within the tax modules delineated for the specific tax years in this litigation documented within the Master Files subsystem known as the Individual Master File Martinsburg Computing Center Transcript Complete[4], Data Services, CADE Treasury/IRS 24.030 that substantiates the aforementioned Settlement Officer's administrative claim and subsequent determination that there exists a deficiency which is collectable by a Notice of Federal Tax Lien.
5. The Transaction Code 494 is defined in the Transactions Code Pocket Guide; Document 11734 (Rev. 6-2004)[5] as denoting the documentation and thus the recorded existence of a Statutory Notice of Deficiency.
6. The Respondent Commissioner of Internal Revenue and this Court know well the substantive requirement of said Respondent to maintain its "systems of records" on an individual in compliance to Title 5 USCA Chapter 5 § 552a, wherein specifically § 552a(a)(5) statutorily defines the term " systems of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying

---

[4] Exhibit 2 P: Individual Master File Martinsburg Computing Center Transcript Complete generated 05/29/2008

[5] Exhibit 4 P: Transactions Code Pocket Guide Document 11734 (Rev. 6-2004)

number, symbol, or other identifying particular assigned to the individual.

7. The Respondent Commissioner of Internal Revenue's Settlement Officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met. The Respondent Commissioner of Internal Revenue has not submitted evidence in this instant case that substantiates the Settlement Officer had secured verification from the Secretary in compliance to the Internal Revenue Service Restructuring and Reform Act of 1998 as is codified in Title 26 USCA Subtitle F Chapter 64 Subchapter D Part 1 § 6330(c) (1).
8. The Respondent Commissioner of Internal Revenue stands upon its wrongful misleading silence to move its systemic fraud upon the Court when said respondent knows its "systems of records" does not substantiate the determination issued by its Settlement Officer as the Petitioner presented the Individual Master File Martinsburg Computing Center Transcript Complete[6] that substantiates the fraud moved by said Settlement Officer who issued a Determination Letter[7] wherein said determination stands in violation to Title 5 USCA Chapter 5 § 552a(e)(5).
9. The Respondent Commissioner of Internal Revenue has chosen to stand upon its systemic fraud wherein it knows that the Settlement

---

[6] United States v. Buford, 889 F.2d 1406, 1407 (5th Cir. 1989)

[7] Exhibit 1 J: Notice of Determination

Officer deliberately failed to validate the collection case file computer transcripts documented the existence of a deficiency that may then be administratively pursued by the collection division.

10. The Respondent Commissioner of Internal Revenue's deliberate movement in direct violation to substantive law, substantiates its Settlement Officer knew that the Individual Master File Tax Modules contain the data that contradicts said settlement officer's issued Determination Letter[8], as the Individual Master File Martinsburg Computing Center Transcript Complete[9] is the administrative record that annotates the status of documentation utilized by said Respondent to perfect the administrative collections of deficiencies.
11. This false representation of the substantive law by the Respondent Commissioner of Internal Revenue in conjunction with its Settlement Officer stands as a deliberated misstatement of fact, and law that is being used by said Respondent to ***perfect a fraud*** upon the Court and the substantive rights of this Petitioner.
12. The Respondent Commissioner of Internal Revenue's Settlement Officer has issued its statutory Notice of Determination by moving wrongful misleading silence totally reliant upon its enjoyment of a *conclusive presumption* , whilst acknowledging it has no predicate evidence that its Individual Master File Martinsburg

---

[8] Exhibit 1 J: Notice of Determination

[9] United States v. Buford, 889 F.2d 1406, 1407 (5th Cir. 1989)

Computing Center Transcript Complete[10], which is part of its system of records stands in statutory compliance to Records Management by Federal Agencies and the Federal Administrative Procedures Act.

13. This affirmative misconduct moved by the Respondent Commissioner of Internal Revenue and its adjunct personnel stands in direct violation to the law of the land, wherein said invalid administrative act, the issuance of a Notice of Determination by the Settlement Officer, is being moved by said Respondent Commissioner of Internal Revenue, and its Counsel, who collectively hide behind wrongful misleading silence to perfect a false representation that has been presented to the Court, is self certifying evidence that said Respondent's affirmative misconduct is a deliberated act to deny the substantive rights of the Petitioner Martin Nitschke to the administrative due process of law.
14. This Motion to Vacate exposes the deliberated fraud presented by the Respondent Commissioner of Internal Revenue through its Counsel to this Court, wherein said Respondent is attempting to claim that its Settlement Officer legally executed a Collection Due Process hearing in compliance to the Internal Revenue Service Restructuring and Reform Act of 1998 that is codified in Title 26 USCA § 6330(c) (2) (A) (ii)[11].

---

[10] United States v. Buford, 889 F.2d 1406, 1407 (5th Cir. 1989)

[11] (ii) challenges to the appropriateness of collection actions

15. This Motion to Vacant challenges a decision of the Court, wherein said decision is reliant upon the Respondent Commissioner of Internal Revenue's use of its *conclusive presumption* that was presented to willfully suborn ***plain errors*** in statements of fact that said Respondent's Settlement Officer has used to issue a fraudulent Notice of Determination in which said Settlement Officer claims it may issue the aforementioned determination as if the aforementioned Respondent's system of records stand in substantive compliance to Record Management by Federal Agencies and the Federal Administrative Procedures Act.
16. The Supreme Court stated in Citizens to Preserve Overton Park v Volpe, 401 US 402, 413-414 (1971) "reviewing court shall . . . hold unlawful and set aside agency action , findings, and conclusion found" not to meet six separate standards. In all cases agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance to with law or if the action failed to meet statutory procedural, or constitutional requirements.

    (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
    (B) contrary to constitutional right, power, privilege, or immunity;
    (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure, required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or unwarranted by facts to the extent that the facts are subject to trial de novo by the reviewing court

17. There exists in the record of the Court, the substantive *material fact* that the Respondent Commissioner of Internal Revenue's system of records, administratively recognized as the Individual Master File, substantiates that which will be outcome determinative of this issue in this instant case, that the Settlement Officer's declaration issued as a Notice of Determination that it validated all applicable laws, and administrative records, sits in this Court in ***plain error***, which is better described as a systemic fraud.
18. The Respondent Commissioner of Internal Revenue's Settlement Officer claim that it may issue its Notice of Determination is a false representation in which said Respondent's Personnel is moving affirmative misconduct under the color of the aforementioned Respondent's in house administrative collection activity, wherein its presents a "Notice of Determination" to perfect its *Notice of Federal Tax Lien* by devious means.

19. The codification of the Internal Revenue Law does not change the statutory fact, that the Respondent Commissioner of Internal Revenue is prohibited from exceeding its administrative limitations, which in this instant case, prior to moving its statutory Notice of Determination , it shall first as a matter of statutory law, substantiate its administrative records authenticate the existence and therein document within its system of records maintained upon the Individual, the statutory existence of the underlying deficiency, which in this instant case, the Settlement Officer is unable to evidence in compliance to the Rules of Evidence that it authenticated that all applicable system of records stood timely, accurate, relevant and complete.
20. The Substantive and Statutory failure by the Settlement Officer to validate the administrative system of records as required by law is self evident wherein the documentation in the Individual Master File Tax Modules for the taxable calendar years 1993, 1997, 1998, 1999, 2000, 2001, and 2002 evidence there is no documentation that authenticates the Notice of Determination that there exits an underlying Notice of Deficiency that shall authenticate a collection action by the Collection Division.
21. This lack of statutory documentation in the Respondent Commissioner of Internal Revenue's system of records maintained upon the Individual under the authority of the Federal Administrative Procedures Act substantiates the legal fact that the administrative records reviewed by the

aforementioned settlement officer are not in statutory compliance to substantive law as codified in Title 5 USCA Chapter 5 § 552a(e)(5). This legal fact evidences that the Notice of Determination violates Title 5 USCA Chapter 5 § 552a(e)(6) and therefore substantiates the fraud issued by the Settlement Officer under the color of Title 26 USCA Subtitle F Chapter 64 Subchapter D Part 1§ 6330(c)(1).

22. The systemic fraud being moved by the Respondent Commissioner of Internal Revenue and subsequently endorsed by the Settlement Officer under the color of a Notice of Determination is substantiated by self certifying evidence documented in the Tax Modules indices located within the Individual Master File for each and every aforementioned taxable calendar year compiled in this litigation substantiates the Respondent Commissioner of Internal Revenue NEVER documented an underlying Notice of Deficiency which may then be pursued by the Collection Division by the issuance of a Notice of Federal Tax Lien.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT United States Court of Appeals

Fifth Circuit

F I L E D May 29, 2009

No. 08-60974

Summary Calendar Charles R. Fulbruge III, Clerk

MARTIN NITSCHKE

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent-Appellee

Appeal from the United States Tax Court

USTC No. 696-07L

Before HIGGINBOTHAM, BARKSDALE, and ELROD, Circuit Judges.

PER CURIAM:[12*]

Petitioner-appellant Martin Nitschke, proceeding pro se, appeals the United States Tax Court's denial of a motion to vacate its order and decision sustaining the determinations made by the Internal Revenue Service Appeals Office in favor of respondent-appellee, the Commissioner of Internal Revenue.

For the tax years 1993 and 1997 through 2002, Nitschke either failed to file federal income tax returns or filed returns reflecting a zero tax liability. The Commissioner assessed these liabilities and sent notice and demand to Nitschke, yet a balance remains due. After the Office of Appeals sustained a notice of tax lien issued to Nitschke, the Tax Court upheld this determination. Nitschke moved to vacate the court's order and decision. The Tax Court denied the motion by notation stamped on the document.

No. 08-60974

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not
be published and is not precedent except under the limited circumstances set forthin 5TH CIR.
R. 47.5.4.

On appeal, instead of challenging the underlying tax liabilities, or the Tax Court's imposition of a penalty for frivolous delay[13], Nitschke claims only that the Tax Court's denial of his motion to vacate by means of stamped notation is an abuse of discretion. He has waived all other issues by failing to raise and argue them in his opening brief on appeal[14]. This rule applies even when the appellant is appearing pro se[15].

We construe Nitschke's pro se brief liberally[16]. Even so, he fails to demonstrate the Tax Court abused its discretion by denying Nitschke's motion to vacate by stamped notation.

---

[1] In assessing this penalty, the Tax Court noted that Nitschke had previously filed andlost other actions challenging his tax liabilities, and had been warned about the possible imposition of sanctions: Nitschke v. United States, 2003-1 U.S. Tax Cas. (CCH) ¶ 50,432, at 88,242 (D. Nev. 2003) (aff'd 92 F. App'x 529 (9th Cir. 2004)), Nitschke v. Commissioner of Internal Revenue, 76 F. App'x 137 (9th Cir. 2003).

[2] See United States v. Jackson, 426 F.3d 301, 304 n.2 (5th Cir. 2005).

[3] Id.; Knighten v. Commissioner, 702 F.2d 59, 60 n.1 (5th Cir. 1983).

[4] See United States v. Robinson, 542 F.3d 1045, 1050 (5th Cir. 2008).

Nitschke made one set of meritless arguments to the Tax Court at trial and the Tax Court rejected those claims in a written opinion. Nitschke then re-asserted those same claims in his motion to vacate; he is not entitled to a second written opinion on those issues. The Tax Court's denial of Nitschke's motion to vacate is AFFIRMED.

This Page has been intentionally left blank.